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In The
Supreme Court of the United States

WESLEY W. HARRIS, *et al.*,
Appellants,

v.

ARIZONA INDEPENDENT REDISTRICTING COMMISSION, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT OF ARIZONA

BRIEF OF THE SOUTHERN COALITION FOR SOCIAL JUSTICE AS *AMICUS CURIAE* SUPPORTING NEITHER PARTY

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BRIEF OF THE SOUTHERN COALITION FOR SOCIAL JUSTICE AS *AMICUS CURIAE* SUPPORTING NEITHER PARTY

This brief is submitted on behalf of the Southern Coalition for Social Justice ("SCSJ") as *amicus curiae* in support of neither party.[1]

INTEREST OF *AMICUS CURIAE*

Amicus is a 501(c)(3) nonprofit public interest law organization founded in 2007 in Durham, North Carolina. SCSJ partners with communities of color and economically disadvantaged communities in the south to defend and advance their political, social, and economic rights through the combination of legal advocacy, research, organizing and communications. Central to that mission is the guarantee of an equal right to vote for all citizens and the guarantee that each person's vote carries equal weight.

One of *amicus'* primary practice areas is voting rights. *Amicus* frequently represents clients challenging statewide and local redistricting plans that violate the Equal Protection Clause of the Fourteenth Amendment or the Voting Rights Act of

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[1] Appellee Arizona Secretary of State has consented to the filing of *amicus curiae* briefs in support of either party and have so informed the Clerk. Appellee Arizona Independent Redistricting Commission has provided *amicus* with written consent to the filing of this brief. Appellants have provided *amicus* with written consent to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amicus curiae* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

1965. *Amicus* has represented individual and organizational clients in redistricting cases across the South, including Florida, Georgia, North Carolina, South Carolina, Tennessee, Texas, and Virginia.

Currently, *amicus* is representing clients in three pending lawsuits in North Carolina, in state and federal court, challenging congressional, state, and local redistricting plans enacted by the North Carolina General Assembly following the 2010 Census. In each of these cases, the plaintiffs live in overpopulated districts that they allege were drawn in order to unfairly favor one political party over another. *See Wright v. North Carolina*, 787 F.3d 256 (4th Cir. 2015); *Raleigh Wake Citizens Ass'n v. Wake County Bd. of Elections*, No. 5:15-CV-156 (E.D.N.C. June 5, 2015); *City of Greensboro v. Guilford County Bd. of Elections*,[2] No. 1.15-CV-550, 2015 U.S. Dist. LEXIS 95972 (M.D.N.C. July 23, 2015).

Amicus has an interest in ensuring that the central promise of "one person, one vote" as articulated in *Reynolds v. Sims*, 377 U.S. 533 (1964), and *Baker v. Carr*, 369 U.S. 186 (1962), remains a fundamental cornerstone of federal, state, and local governmental structures, and that districting

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[2] The District Court in *City of Greensboro* granted the plaintiffs' motion for preliminary injunction and prevented implementation of a local redistricting plan where the plaintiffs alleged, *inter alia*, that the North Carolina General Assembly arbitrarily and discriminatorily overpopulated certain districts in violation of one person, one vote. *See City of Greensboro v. Guilford County Bd. of Elections*, No. 1:15-CV-550, 2015 U.S. Dist. LEXIS 95972 (M.D.N.C. July 23, 2015).

systems are not established that improperly favor some voters over others.

SUMMARY OF THE ARGUMENT

The one person, one vote rule for legislative redistricting emerged to ensure "the substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the state." *Reynolds*, 377 U.S. at 579. An exception to this rule to accommodate partisan gamesmanship is directly counter to its purpose and role in guaranteeing equal protection.

This Court's one person, one vote mandate, derived from the Fourteenth Amendment, is based on the recognition that "[c]itizens, not history or economic interests, cast votes." *Reynolds*, 377 U.S. at 580. Nowhere—whether in *Reynolds*; *Roman v. Sincock*, 377 U.S. 695 (1964); or their progeny—has this Court taken the drastic step of recognizing advancement of political party interests as a legitimate justification for substantial population disparities among districts. While the application of non-arbitrary, traditional redistricting principles may result in deviations from absolute population equality, discrimination based on political party is an inappropriate method of determining the weight of a citizen's vote. *See Abate v. Mundt*, 403 U.S. 182, 185 (1971); *Karcher v. Daggett*, 462 U.S. 725, 740 (1983).

Holding that a benefit to one political party over another is a legitimate justification for

population deviations, particularly in mid-decade redistricting, would have a far-reaching impact in communities that have traditionally faced significant barriers to equality in voting. *See Rodriguez v. Harris County*, 964 F. Supp. 2d 686, 804 (S.D. Tex. 2013) ("While some . imagine that barriers to voting have been eradicated, the record here is replete with evidence to the contrary.") (internal citations omitted). The last few years have seen a spate of legislative attempts to use an alleged "safe harbor" with respect to population deviations to enact districts that otherwise disadvantage voters who do not support the party in control of the legislature.

One example in North Carolina is the General Assembly's passage of a local redistricting bill that expanded the Wake County Commission from seven to nine members, and changed the seven members elected to staggered terms at-large with residence districts to seven members elected from single-member districts and two members elected from "super districts" with total population deviations of 9.8%.[3] The local bill, which took away the power of the local government body to determine its own boundaries until after the 2020 Census, was passed only after Democrats carried all of the open seats in the 2014 election. The newly adopted redistricting plan is marked by significant population deviations and bizarre-shaped districts that are not geographically compact, and was created to disadvantage voters who have traditionally voted

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[3] *Raleigh Wake Citizens Ass'n v. Wake County Bd. of Elections*, No. 5:15-CV-156 (E.D.N.C. June 5, 2015), Doc. 22, para. 1, 3, 32.

Democratic. "The population deviations in the new district system are a deliberate and systematic attempt . . . to unfairly manipulate the political process to give greater weight to the votes of Republican voters and less weight to the votes of Democratic voters."[4] Holding that manipulating population deviations to discriminate against voters of a particular political party is a legitimate governmental interest would strike a fatal blow to fundamental fairness and the opportunity of all voters to participate equally in the political process.

ARGUMENT

THE DESIRE TO GAIN PARTISAN ADVANTAGE DOES NOT JUSTIFY LARGER THAN NECESSARY POPULATION DEVIATIONS AMONG DISTRICTS

A. Fourteenth Amendment Jurisprudence Values the Equal Weight of Each Vote Above All Else

"[T]he Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of [representatives]." *Reynolds*, 377 U.S. at 566. In a redistricting plan, deviations from numerical equality violate the Equal Protection Clause unless those deviations result from "legitimate considerations incident to the effectuation of a rational state policy." *Reynolds*,

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[4] *Raleigh Wake Citizens Ass'n v. Wake County Bd. of Elections*, No. 5:15-CV-156 (E.D.N.C. June 5, 2015), Amended Complaint, para. 1.

377 U.S. at 579. However, such legitimate considerations must be "free from any taint of arbitrariness or discrimination." *Roman*, 377 U.S. at 710. These protections of one person, one vote also extend to elections for local government offices. *Avery v. Midland County*, 390 U.S. 474, 479 (1968).

Roman further describes the analysis of a one person, one vote claim as follows:

> the proper judicial approach is to ascertain whether, under the particular circumstances existing in the individual State whose legislative apportionment is at issue, there has been a faithful adherence to a plan of population-based representation, with such minor deviations only as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination.

Roman, 377 U.S. at 710. That is, a legislative body violates the one person, one vote mandate where population deviations are motivated by arbitrary or discriminatory reasons.

In a one person, one vote case, plaintiffs can establish a prima facie Equal Protection violation where the overall population deviation is more than ten percent. *Brown v. Thomson*, 462 U.S. 315, 328 (1973). Where the overall population deviation is less than ten percent, the presumption of constitutionality is overcome by the plaintiff's showing that the redistricting process had a "taint of

arbitrariness or discrimination." *Daly v. Hunt*, 93 F.3d 1212, 1220 (4th Cir. 1996) (*quoting Roman*, 377 U.S. at 710).

"[C]ourts should keep in mind that absolute population equality is the paramount objective. Slight deviations are allowed under certain circumstances...any deviation from approximate population equality must be supported by enunciation of historically significant state policy or unique features." *Abrams v. Johnson*, 521 U.S. 74, 98 (1997) (internal citations omitted). Significant state policies recognized by this Court are compactness, respecting city or county boundaries, preserving prior district cores, and avoiding incumbent contests. *Id.; see also Karcher v. Daggett*, 462 U.S. 725, 740 (1983). In the context of population disparities among political districts, the objective to favor voters of one political party over voters of another political party is discriminatory and contrary to the plain language of this Court in *Roman*.

Forty years after *Roman*, this Court confirmed that redistricting plans that deviate from population equality to advantage one political party have a discriminatory taint and must be struck down. *Larios v. Cox*, 305 F. Supp. 2d 1335, 1339 (N.D. Ga. 2004), *aff'd*, 542 U.S. 947 (2004). *Larios* reiterates that this Court has not created a ten percent safe harbor by which all redistricting plans are inherently constitutional and, in fact, the discriminatory treatment of one political party, to the advantage of another, is not a legitimate reason for population inequality. *Id.* at 1339-40. Political

gain need not be the sole reason for the population deviation; it is enough if partisanship infects the redistricting process with a taint of arbitrariness or discrimination. *Id.* at 1338. For example, in *Larios*, the Court "found that the deviations were systematically and intentionally created (1) to allow rural southern Georgia and inner-city Atlanta to maintain their legislative influence even as their rate of population growth lags behind that of the rest of the state; and (2) to protect Democratic incumbents." *Id.*

Cases such as *Larios* and the one person, one vote cases being brought by *amicus* in North Carolina are very different from political gerrymandering claims[5] and, pursuant to one person, one vote analysis, have a well-established framework for judicial review. "The sound reasons for judicial hesitation to remedy partisan gerrymandering within equal population do not fit the different wrong of systematic population inequality for partisan advantage with no other justification." *Harris*, 993 F. Supp. 2d at 1098-99 (Wake, J., dissenting). The dissent of the lower court is also consistent with the language of *Larios* that was summarily affirmed by this Court: "The value at issue today is an individualized and personal one, and therefore the offense to the Equal Protection that occurred in this case is more readily apparent than in a claim involving gerrymandering." *Larios*, 305 F Supp. 2d at 1351, *aff'd*, 542 U.S. 947 (2004).

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[5] *Amicus* believes that partisan gerrymandering claims are justiciable, which was affirmed by a majority of the Court in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), but is not currently litigating any cases asserting such claims.

Interpreting *Larios* correctly, the dissenting judge below found that partisan political gain cannot be a legitimate interest in diverting from population equality. "Partisan advantage is not itself a justification for systematic population inequality in districting. No authority says it is, and neither does the Commission or any judge of this Court." *Harris*, 993 F Supp. 2d at 1090-91 (Wake, J., dissenting). "Of course, this Court has *never suggested* that certain geographic areas or *political interests* are entitled to disproportionate representation." *Abate*, 403 U.S. at 185 (emphasis added). Never has this Court granted unfettered discretion to map-drawers to deviate from population equality for political gain and it should not do so now.

The proper test for determining when political party preference unconstitutionally motivates population deviations in a redistricting plan was articulated by the dissent below:

> The law should defer to state districting authorities' actual, substantial, and honest pursuit of a legitimate means for a legitimate purpose with systematic population inequality, notwithstanding the actual and additional motive of party preferment. *But the valid motive must fairly cover the entirety of the otherwise wrongful inequality.*

Harris, 993 F Supp. 2d at 1106 (Wake, J., dissenting). Thus, if a valid motive does not predominate over an improper purpose, such as partisanship, and that valid motive does not explain

the deviations, then a redistricting plan is discriminatorily tainted and inconsistent with *Roman v. Sincock*. *See* 377 U.S. at 710.

Indeed, this test is consistent with this Court's ruling that "population variances in legislative districts are tolerated only if they are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown." *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 519 (2006) (internal citations omitted). The implications of this decision, and the test this Court ultimately adopts, will impact the redistricting process nationwide. Nowhere are the effects of that national scope more apparent than in North Carolina.

B. Allowing Partisan Advantage to Justify Increased Population Deviations Will Essentially Create a Safe Harbor for Deviations Up to Ten Percent and Will Greenlight the Improper Weighting of Votes Based on Voting Behavior

One needs only to look at current litigation in North Carolina to see how far legislatures are willing to go to use population deviations to create political advantage.[6] These manipulations of

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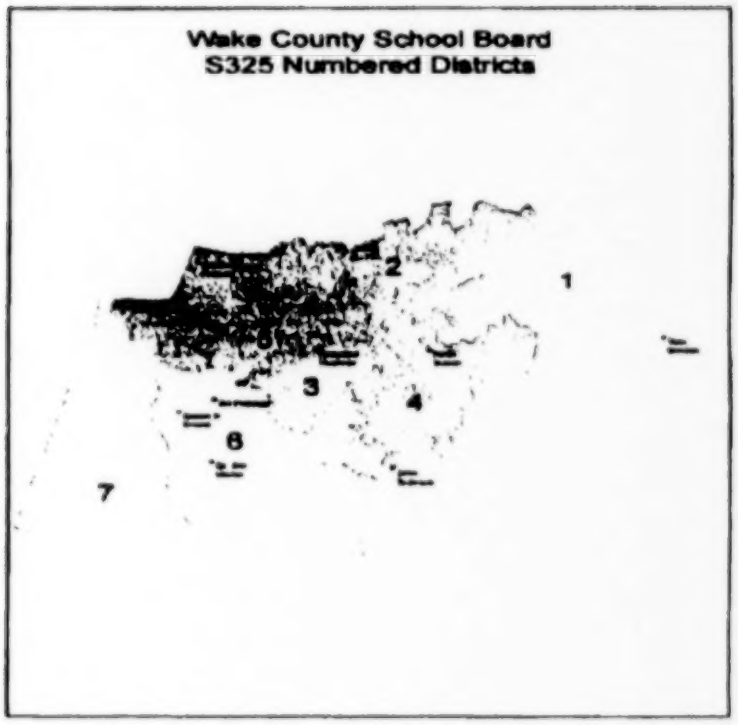
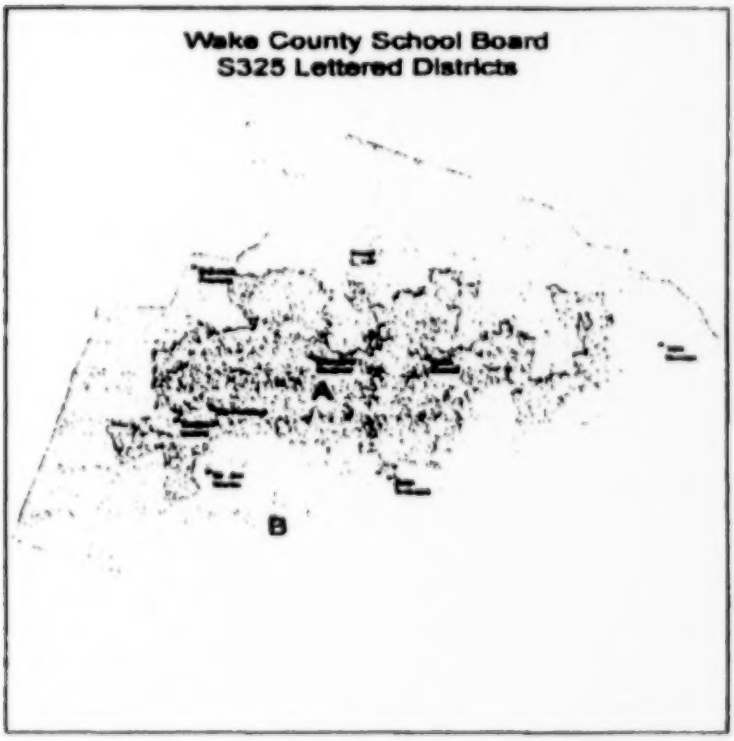
[6] *See Raleigh Wake Citizens Ass'n. v. Wake County Bd. of Elections*, No. 5:15-CV-156 (E.D.N.C. June 5, 2015); *Wright v. North Carolina*, 5:13-CV-607 (E.D.N.C. August 22, 2013); *City of Greensboro v. Guilford County. Bd. of Elections*, No. 1:15-CV-550 (M.D.N.C. July 13, 2015). *Dickson v. Rucho*, 766 S.E.2d 238 (N.C. 2014), *vacated*, 135 S. Ct. 1843 (2015); *Covington v. North Carolina*, 1:15-CV-00399 (M.D.N.C. July 24, 2015).

districts for partisan reasons have often occurred in mid-decade redistricting schemes and have focused on local jurisdictions.

Until 2013, Wake County, North Carolina had a nine member school board that was elected from single-member districts. *Wright v. North Carolina*, 787 F.3d 256, 259 (4th Cir. 2015). In 2011, the *majority Republican* school board redrew its districts, which were geographically compact and had a maximum population deviation of 1.66%. *Id.* at 260. The fall 2011 elections under this plan resulted in a Democratic majority on the school board. *Id.* After that election, in 2013, the Republican-controlled General Assembly, over the objection of the majority of the school board, passed a new redistricting plan (effective in 2016) for solely the Wake County School Board. *Id.* The local bill (S235) changed the nine at large districts to seven single-member numbered districts and two lettered "super-districts," with an overall deviation of 9.8%. *Id.* The donut-shaped super-districts overpopulated the urban part of the county that voted predominantly Democratic and underpopulated the rural and suburban parts of the county that voted Republican. *Id.* The bizarreness of the districts' shapes is readily apparent:

Wake County School Board
Current Districts
7
6
1
9
4
5
8
2


Wake County School Board
S325 Numbered Districts
1
2
3
4
5
6
7


Wake County School Board
S325 Lettered Districts
A
B

"Wake County is thus burdened with some substantially over-populated districts, where votes will be diluted vis-à-vis other substantially under-populated districts." *Id.* It is no surprise, as an example, that super-district B, which is majority-Republican, is underpopulated by -4.90% and super-district A, which is majority-Democratic, is overpopulated by +4.90%.[1] Based on 2012 election data, although President Obama won a majority of the nine districts in the 2011 plan, he would not have won a majority of the districts under the 2013 local bill.[2]

It is clear that partisan gamesmanship in overpopulating Democratically-leaning areas to the benefit of underpopulated Republican areas was part of the intent behind the bill. The Fourth Circuit correctly found that, "Plaintiffs allege such a 'taint of arbitrariness or discrimination'...as in *Larios*, [where] a state legislature designed a redistricting plan with a maximum deviation in population just under 10%, designed to pit rural and urban voters against one another, and intended to favor incumbents of one political party over those of another." *Wright*, 787 F.3d at 267 Voters in Wake County (and elsewhere), some of whom have had their votes discounted for political gains, are harmed by this redistricting strategy, which is contrary to the plain language of this Court: "Having once granted the right to vote on equal terms, the State may not, by later arbitrary and separate treatment, value one person's vote over that of another." *Bush*

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[1] *See Wright v. North Carolina*, 5:13-CV-607 (E.D.N.C. August 22, 2013), Doc. 1, pp. 17-19.

[2] *Id.* at p. 18.

v. Gore, 531 U.S. 98, 105-06 (2000). The arbitrary and discriminatory strategy evident in *Wright* is not the only example in North Carolina.

In 2014, the majority Republican General Assembly passed a local bill to redistrict the Wake County Board of County Commissioners. *Raleigh Wake Citizens Ass'n. v. Wake County Bd. of Elections*, No. 5:15-CV-156 (E.D.N.C. June 5, 2015), Doc. 22, p. 1. In *Raleigh Wake*, the present system of electing county commission members is an at-large system with residency districts. *Id.* at 7. As in *Wright*, in 2011, the *majority-Republican* county commission redrew its residential districts to have a minimal overall population deviation even though, with at-large elections, the residency districts did not need to be the same size. The 2014 election resulted in a Democratic sweep of the open county commission seats. *Id.* at 7-8.[3] In political retaliation, the General Assembly, as in *Wright*, passed a local bill (2015 N.C. Sess. Laws 2015-4) to create seven single-member districts and two super-districts. *Id.* at 8.

The *Raleigh Wake* plan contains identical deviations to the *Wright* redistricting plan, with population deviations of 7.11% for the seven single-member districts and 9.8% for the super-districts. *Id.* at 10. In the middle of the decade, and after a huge Republican loss under a system devised by a Republican-leaning local government, the majority

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[3]*See Wake County, NC General Election Official Results*, (Nov. 4, 2014), http://www.wakegov.com/elections/data/Past%20Election%20Results/2014-11-04%20-%20General%20Election/2014.11.04.Summary.htm.

majority Republican General Assembly again injected itself into the local redistricting process to more heavily weight the votes of Republican voters in the county.

Two months after the *Raleigh Wake* redistricting plan was passed by the General Assembly, the legislature employed this discriminatory strategy yet again by passing a local redistricting plan for the City of Greensboro's city council. *City of Greensboro v. Guilford County. Bd. of Elections*, No. 1:15-CV-550 (M.D.N.C. July 13, 2015), Doc. 1, p. 1. Previously, the city council was made up of three members elected at-large and five council members elected from single-member districts; the local bill, which was preliminary enjoined by the district court,[4] created eight handcrafted single-member districts. *Id.* at 13. These districts do not comport with traditional redistricting criteria and create an overall population deviation of 8.25%, compared to 3.95% under the previous plan. *Id.* at 15.

Political gain for Republicans was again at the heart of this plan. "The reason for the 8.25% overall population deviation in this plan is to disadvantage certain incumbents because of their party affiliation....The 8.25% overall population deviation was also caused by the desire to maximize the voting strength of Republican voters and minimize the voting strength of Democratic voters." *Id.* at 16. Only one member of the city council is a Republican,

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[4] *City of Greensboro v. Guilford County. Bd. of Elections*, No. 1:15-CV-550, 2015 U.S. Dist. LEXIS 95972 (M.D.N.C. July 23, 2015).

and while this member was not paired with another incumbent in the General Assembly's plan, six out of seven Democratic members were paired with another Democratic incumbent. *Id.* at 17. Further, the lone Democrat who was not paired is now in a district that voted 59.6% straight-ticket Republican in the 2010 General Election. *Id.*

This political gamesmanship is the sort of discriminatory treatment of voters forbidden in *Reynolds*, *Roman*, and *Larios*. It strikes at the heart of the franchise. "[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds*, 377 U.S. at 555. If this Court finds that partisan advantage is a legitimate justification for the population deviations seen in the instant case, it will create a safe harbor for the kinds of machinations seen in these North Carolina cases. Such strategies are arbitrary, discriminatory, and contrary to everything one person, one vote is meant to protect.

CONCLUSION

For the reasons articulated above, and in order to ensure that federal law continues to protect the individual rights of voters from arbitrary and discriminatory devaluing of their votes, *amicus* respectfully requests that the Court hold that partisan considerations do not justify larger than necessary population deviations among districts.

Respectfully submitted,

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